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JOHN F. SPANOL, JR.  
CLERK

IN THE

**Supreme Court of the United States****October Term, 1989****FLOYD ROBERTS,  
*Petitioner,*****vs.****STATE OF OHIO,  
*Respondent.***

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**ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF OHIO**

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**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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**COUNTER QUESTION OF LAW**

Respondent submits that the first question presented by the record in this case is more aptly stated as follows:

1. Whether a suspect who has not been charged with any crime and who has previously provided an incomplete handwriting exemplar to officers of the United States Secret Service, should be required to complete the partial exemplar.



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No. 89-1963

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TO: The Honorable, the Chief Justice and the  
Associate Justices of the Supreme Court of the United  
States:

### OBJECTIONS TO JURISDICTIONS

There are no substantial federal questions involved  
which would require this Court to review this case.

Further, the issuance of an order granting a  
handwriting exemplar is not a final appealable order.  
*State ex rel. Celebreeze v. Pearson* (Fifth District,  
October 25, 1989) C.A. No. 927 and *Union Oil Company  
of California v. Hertel* (1980), 89 Ill. App. 3d 383, 411  
N.E. 2d 1006.

## STATEMENT OF THE CASE

On September 7, 1989, upon written motion of the Prosecuting Attorney's office (attached as Exhibit "A"), the trial court granted a motion ordering petitioner to submit to a handwriting exemplar. Motions of this type are routinely granted on request of a law enforcement agency to determine whether charges should be brought. It should be noted that no charges had been nor have been filed against petitioner. The request for this handwriting exemplar was made by the United States Secret Service in furtherance of an investigation being conducted by that agency.

Petitioner filed a Motion to Vacate the Order, stating that the petitioner had already given approximately twenty (20) handwriting samples. Further, petitioner claims that there is no issue of identification in that he has admitted signing the check in question. In response, the Prosecuting Attorney's office filed a Supplemental Affidavit of the agent with the U.S. Secret Service conducting this investigation (attached as Exhibit "B"). In essence, the affidavit stated that the exemplar was an incomplete sample, as the agent was interrupted from the exemplar session on an emergency. On the issue of identification, the Secret Service had no question that petitioner signed his own name to the forged check. It was the signature of the co-payee that is believed to have been forged by petitioner.

The court overruled petitioner's Motion to Vacate and ordered into effect its original entry granting the exemplar request.

As this was still only in its investigation phase and no case against petitioner was pending, no case number was assigned to the trial court's order.

The petitioner obtained a special case number from the Clerk of Courts and appealed the order to the Eighth District Court of Appeals. The appellate court, *sua sponte*, dismissed the appeal and subsequently overruled petitioner's Motion for Reconsideration.

The matter was appealed to the Supreme Court of Ohio where that court refused jurisdiction. The petitioner now seeks a writ of certiorari from the United States Supreme Court.

In the meantime, the Secret Service has been unable to obtain sufficient handwriting exemplars to submit to its forensic experts and petitioner's delay tactics have effectively brought their investigation to an impasse.

## REASONS FOR DENYING THE WRIT

1. A suspect who has not been charged with any crime and who has previously provided an incomplete handwriting exemplar to officers of the United States Secret Service should be required to complete the partial exemplar.

Petitioner contends that it is "unreasonable and unfair" to order him to give a handwriting exemplar. Petitioner contends that since a partial sample was given by him, he should not be ordered to submit to additional exemplars.

Petitioner's true objection lies with the nature of this order—a handwriting exemplar. It has long been recognized that certain acts conducted by law enforcement authorities do not constitute testimonial compulsion in derogation of a citizen's constitutional rights. Such acts are generally termed non-testimonial evidence. Non-testimonial evidence may be defined, generally, as any evidence taken from the person of a suspect which does not involve his comment on his own guilt. The most common non-testimonial evidence includes fingerprints, blood samples, hair samples, voice samples and handwriting exemplars. This rule of law was first espoused in *Holt v. United States*, (1910), 218 U.S. 245. The subject of handwriting exemplars and the privilege against self-incrimination was addressed by the United States Supreme Court in *Gilbert v. California* (1967), 388 U.S. 253 at 262. See also *U.S. v. Dionisio* (1973), 410 U.S. 1.

The Ohio Courts leave no doubt that handwriting exemplars are permitted in criminal investigations, even when obtained by ex parte motions. *State v. Kiser* (1969), 13 Chio St. 2d 126; *State v. Heston* (1972), 29 Ohio St. 2d 152; and *State v. Ostrowski* (1972), 30 Ohio St. 2d 34.

Having realized the enormous body of authority recognizing the validity of handwriting exemplars, petitioner now indicates that the request for exemplars was "unfair and unreasonable." Citing no authority requiring it, the petitioner states that the Secret Service made no showing of probable cause in requesting the exemplar. Obviously, a showing of probable cause (to a Grand Jury) would be required to obtain an indictment against the petitioner. However, the Secret Service is not yet in a position to present evidence to a Grand Jury without adequate handwriting exemplars for expert analysis. The law enforcement agency has in fact acted reasonably here, indicating to the trial court, by affidavit, that due to an emergency, they were unable to complete the handwriting sample and were in need of additional exemplars. Further, letters were exchanged between counsel for the petitioner and the prosecuting authorities noting the disposition of the appellate review and rerequesting an appointment for the completion of the sample (See Exhibits A and B in petitioner's Petition for Writ.)

Just as there is a likelihood that petitioner will be implicated by the handwriting samples, there is at least an equal likelihood that the samples will exonerate him. The point is that without the samples the Secret Service is unable to proceed to a Grand Jury for even a showing of probable cause. In the event the samples implicate the petitioner, he is fully entitled to all of the due process protections of any criminal defendant, *i.e.*, preliminary hearings, bill of particulars, discovery and a trial on the merits; and there is no unreasonable burden placed on petitioner in requesting that he give a complete writing sample.

In light of this, there is no showing by petitioner of any "unfair or unreasonable" due process violation.

Petitioner places reliance on *U.S. v. Green*, 282 F. Supp. 373 (D.C. Inc., 1968). This reliance is misplaced because the law enforcement agency in the case at bar does not have a *complete* sample. In that this is merely in the investigatory stages, a complete sample would only enable the law enforcement agency to determine the extent of petitioner's involvement, if any, in criminal activity.

There certainly is a need for law enforcement officials to have the ability to fully investigate criminal activity. With insufficient exemplars, the Secret Service is hamstrung and unable to proceed with its investigation. The constitutional question well settled, the Secret Service seeks only to complete its investigation free of dilatory and judicially abusive tactics on the part of petitioner's counsel.

## CONCLUSION

The issue presented for review is not a final appealable order. If, however, the issue is deemed to be appealable, there is no constitutional question in that handwriting exemplars are recognized and routinely granted, and that the law enforcement agency seeking same acted fairly and reasonable.

Accordingly, petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN,  
*Counsel of Record*  
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*Attorneys for Respondent*



**APPENDIX**  
**EXHIBIT "A"**

**MOTION FOR HANWRITING EXEMPLAR**  
**IN THE COURT OF COMMON PLEAS**  
**CRIMINAL DIVISION**

**STATE OF OHIO**  
**COUNTY OF CUYAHOGA**  
**IN RE: FLOYD ROBERTS**

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Now comes the Prosecuting Attorney on behalf of the People of the State of Ohio and respectfully moves this Honorable Court to order Floyd Roberts to submit a handwriting exemplar for the reasons set forth and more fully developed in the brief attached hereto and made a part thereof.

**JOHN T. CORRIGAN,**  
**Prosecuting Attorney**  
**BY: WILLIAM R. CAINE**  
**William R. Caine**  
**Assistant Prosecuting Attorney**  
**1200 Ontario Street**  
**Cleveland, Ohio 44113**

**BRIEF**

It has been brought to the attention of the Cuyahoga County Prosecuting Attorney's Office that Special Agent Michael Dobeck of the United States Secret Service has been investigating a check forgery involved a United States warrant. Some of the writing on that warrant may have been by Floyd Roberts (D.O.B. 05/09/37, S.S. #233-62-6173) and to further investigate these writings, a handwriting exemplar is necessary.

Therefore, in order to further investigate the illegal forged warrant in the interest of justice, we respectfully request this Honorable Court to order Floyd Roberts to submit a handwriting exemplar.

Certain acts conducted by law enforcement authorities do not constitute testimonial compulsion in derogation of a citizen's Fifth Amendment rights. Such acts are generally termed non-testimonial evidence taken from the person of suspect which does not involve his comment on his own guilt. The most common non-testimonial evidence includes fingerprints, photographs, blood samples, voice prints and handwriting samples. The subject of handwriting exemplars and the privilege against self-incrimination was addressed by the Supreme Court in *Gilbert vs. California* (1967), 388 U.S. 253, at page 267. The Supreme Court in *Gilbert* held that, a "mere handwriting exemplar, in contrast to the content of what is written like the voice or body itself, is an identifying physical characteristic outside its protection, i.e., the protection afforded by the Fifth Amendment." See also *U.S. v. Dionisio* (1973), 410 U.S. 1.

Ohio Case law on the obtaining of a handwriting exemplar clearly permits the same. *State v. Kiser* (1969, 13 Ohio St. 2d 126; *State v. Heston* (1972) 29 Ohio St. 2nd 152; *State v. Ostrowski* (1972), 30 Ohio St. 2d 34.

For reasons stated above, the People of the State of Ohio respectfully request that this Honorable Court grant the above motion.

Respectfully submitted,  
BY: WILLIAM R. CAINE  
William R. Caine  
Assistant Prosecuting Attorney

**IN THE COURT OF COMMON PLEAS  
CRIMINAL DIVISION**

**STATE OF OHIO  
COUNTY OF CUYAHOGA**

**IN RE: FLOYD ROBERTS**

**ORDER**

This matter came on to be heard upon the written motion and brief of the Cuyahoga County Prosecuting Attorney and made at the request of the office of the Prosecuting Attorney and the Court for good cause shown makes the following order:

That Floyd Roberts furnish a handwriting exemplar to be administered under the direction and control of Special Agent Michael Dobeck of the United States Secret Service or other members of said agency. This said exemplar than shall be conveyed by the Secret Service to their authorized handwriting analyst.

That said exemplar shall be taken forthwith at the earliest convenience of Floyd Roberts.

**DATED: This 7th day of September, 1989.**

**WILLIAM E. AURELIUS  
JUDGE, COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

**EXHIBIT "B"**

**SUPPLEMENTAL AFFIDAVIT**

**IN THE COURT OF COMMON PLEAS  
CRIMINAL DIVISION**

**JUDGE WILLIAM E. AURELIUS**

**STATE OF OHIO  
COUNTY OF CUYAHOGA**

**IN RE: FLOYD ROBERTS**

Now comes the Office of the Prosecuting Attorney of Cuyahoga County, Ohio, and respectfully submits the attached and incorporated Affidavit in Support of the court order dated September 6, 1989 requiring FLoyd Roberts to submit to a handwriting exemplar by officers of the United States Secret Service.

Wherefore, the State prays that Mr. Roberts' Motion to Vacate the September 6, 1989 Court order be denied, and that this court order be carried into effect.

Respectfully submitted,

**JOHN T. CORRIGAN,  
Prosecuting Attorney  
Cuyahoga County, Ohio**

**BY: WILLIAM R. CAINE  
William Caine  
Assistant Prosecuting Attorney  
Justice Center—9th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113.**

**SERVICE**

A Copy of the foregoing Supplemental Affidavit was served upon counsel for Floyd Roberts, Herbert L. Bernstein and Deborah Purcell Goshien, The Illuminating Building, Suite 1325, 55 Public Square, Cleveland, Ohio 44113, by ordinary United States mail this \_\_\_\_\_ day of September, 1989.

**WILLIAM R. CAINE**  
**William Caine**  
**Assistant Prosecuting Attorney**

**EXHIBIT A**

**STATE OF OHIO  
COUNTY OF CUYAHOGA**

**AFFIDAVIT**

Now comes the Affiant, Michael J. Dobeck, being of lawful age and sound mind and memory, and being first duly sworn deposes and states as follows:

1. That he is a duly commissioned agent in the United States Secret Service, presently assigned to the Cleveland, Ohio field office.
2. That he is presently investigating the forgery of United States warrant.
3. That in furtherance of the investigation, he has deemed it necessary to obtain handwriting exemplar from a one Floyd Roberts.
4. That he in fact met with Mr. Roberts on or about the 29th day of August, 1989 and did in fact obtain a partial handwriting sample.
5. That he and his partner, Special Agent Dave Robie, were called away from this interview of August 29, 1989 on an emergency call, and were unable to complete the handwriting exemplar of Mr. Roberts.
6. That pursuant to Secret Service guidelines, the partial sample obtained is insufficient for their forensic experts to compare.

7. That the complete handwriting exemplar of Mr. Roberts is necessary to complete this investigation.

Further affiant sayeth naught.

**MICHAEL J. DOBECK**  
Special Agent  
United States Secret Service

Sworn to and subscribed in my presence this  
\_\_\_\_ of September, 1989.

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**NOTARY PUBLIC**

**IN THE COURT OF COMMON PLEAS  
CRIMINAL DIVISION  
JUDGE WILLIAM E. AURELIUS**

**STATE OF OHIO  
COUNTY OF CUYAHOGA  
IN RE: FLOYD ROBERTS**

**ORDER**

After consideration of Mr. Floyd Roberts' Motion to Vacate Order and the Supplemental Affidavit filed by the Cuyahoga County Prosecutors Office and for good cause shown, the Motion to Vacate is overruled, and the September 6, 1989 order requiring Mr. Floyd Roberts to submit to a handwriting exemplar by officers of the United States Secret Service shall remain in effect.

It is so ordered.

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**JUDGE, COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

**EXHIBIT "C"**

STATE, ex rel. CELEBREZZE, Plaintiff-Appellee  
v. DAVID K. PEARSON, JR., et al.,  
Defendant-Appellant

State ex rel. Celebrezze v. Pearson

1989 Ohio App. LEXIS 414

Case No. CA-927; THE LEXIS PAGINATION OF  
THIS DOCUMENT IS SUBJECT TO CHANGE  
PENDING RELEASE OF THE FINAL PUBLISHED  
VERSION.

October 25, 1989, Decided

[\*1]

Court of Appeals of Ohio, Fifth Appellate District,  
Ashland County

**STATEMENT:**

**CHARACTER OF PROCEEDINGS:** Civil Appeal  
from Common Pleas Court, Case No. 33780.

**SMART**

**OPINION**

**IRENE B. SMART, J.**

This is an appeal from a judgment of the Court of Common Pleas of Ashland County, Ohio, that ordered defendant-appellant David Pearson, Jr. to comply with a discovery order. Specifically, he was ordered to attend the deposition and to provide a handwriting exemplar to plaintiff-appellee State of Ohio.

We find that we have no jurisdiction to review this judgment because it is not a final appealable order, *State, ex rel. Benton's Village Service v. Usher* (1973), 34 Ohio St.2d 55; *Klein v. Bendix Westinghouse* (1968), 13 Ohio St.2d 85.

The appeal is dismissed, and the cause is remanded to the trial court for further proceedings in accord with applicable law.

**JUDGMENT ENTRY**

For the reasons stated in the Memorandum-Opinion on file, this appeal is dismissed, and the cause is remanded to the trial court for further proceedings in accord with applicable law.

**JUDGMENT: Dismissed**

Hon. Irene B. Smart, J., Hon. Norman J. Putman, P.J., Hon. W. Scott Gwin, J. concur.

For Plaintiff-Appellee: ANTHONY J. CELEBREEZZE, [\*2] Attorney General, DIANNE GOSS PAYNTER, Chief, Consumer Protection, TED BARROWS, Assistant Attorney General, Columbus, Ohio.

For Defendant-Appellant: LAW FIRM OF GARY PAUL PRICE, GARY PAUL PRICE, Columbus, Ohio.